Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

* * *

NO. 79-1186

* * *

ORVILLE E. DENNIS,

Petitioner

V.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,

Respondents

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LAURA S. MARTIN
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

* * *

No. 79-1186

* * *

ORVILLE E. DENNIS,

Petitioner

V.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,

Respondent

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

STATEMENT

This Brief of the State of Texas is submitted by the Honorable Mark White, Attorney General of the State of Texas, in accordance with Rule 42, paragraph 4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICUS CURIAE

The State of Texas and the judges of the State of Texas are not parties to this case.

Nevertheless, the holding of the United States Court of Appeals for the Fifth Circuit, which is pending before this Court, adversely affects the interests of all the judges of the State of Texas (and of the judges of other

states and of the federal judiciary) by diminishing the protection of judicial immunity which has long been thought to be the backbone of a strong and independent judiciary.

In this case, the general principle or doctrine of judicial immunity was preserved by the Court of Appeals.

However, the Court below further held that, while a state judge is immune from suit under 42 U.S.C., Section 1983, his alleged participation in a conspiracy under that statute confers on the alleged conspiracy the requisite action under color of state law so that a claim can be maintained under Section 1983 against private citizens who are alleged to be the co-conspirators of the judge.

There has been an additional erosion of judicial immunity where the federal courts have upheld the doctrine of judicial immunity in cases where a judge is sued but have awarded attorneys fees against the judge as well as against other defendants in the lawsuit.

The State of Texas feels that both the decision being reviewed, permitting joinder of private alleged conspirators with a state judge in a 1983 conspiracy case which perforce requires the judge to become a defense witness to deny his participation in the asserted conspiracy, and the decisions awarding attorneys fees against an otherwise immune judge, undermine the doctrine of judicial immunity and will weaken the entire judiciary of this country, both state and federal.

ARGUMENT

The decision of the Court of Civil Appeals runs counter to the purpose, reason and philosophy for the doctrine of judicial immunity. The decision permits a conspiracy to be alleged under 42 U.S.C., Section 1983 against private persons who are not acting under color of state law if it is alleged that they were acting and

conspiring with the state district judge who will provide the requisite state action.

The decision converts every state judicial determination into a potential 1983 case where one of the litigants, as is almost always the case, is dissatisfied with the decision. Every state case, whether it be a contract case, an employment termination case, or a tort claims case provides the raw material for a federal lawsuit when couched appropriately as a conspiracy under Section 1983.

The decision forces a state judge to become a witness in a civil rights case. If the desire to vindicate his honor and integrity will not bring him into the federal judicial arena to deny the conspiracy and any complicity or wrongdoing, due process and fundamental fairness require that the judge be a witness for the private-person defendant-conspirators so that their due process rights to defend against the alleged conspiracy can be protected. Even federal judges are not immune from the decision of the Court of Appeals. Where a state prisoner is dissatisfied with the decision in the federal habeas corpus case and alleges a conspiracy on the part of state officers who do not enjoy either judicial immunity or quasi-judicial immunity, *i.e.*, a state sheriff, a state police officer and others enjoying only the defense of good faith immunity, and such officers who are alleged to have acted in concert with the federal judge making the decision, the federal judge becomes an involuntary and unwitting witness in the defense of the asserted conspiracy. The decision below provides a good example of possibilities opened up by the courts holding. The litigants below who sought to pierce the veil of judicial immunity surrounding the state district judge and lost could allege a conspiracy under 42 U.S.C., Section 1983 on the part of their opposing private litigants, the federal judges, and the state judge to provide the requisite state action. While the judges, both state and federal, would be immune from the award of damages, they would become needed and perhaps necessary (in

fundamental fairness terms) witnesses for the private defendants.

In another area, the doctrine of judicial immunity has been sapped of some of its strength. There is pending before this Court, the case of *Consumers Union of the United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979), cert. granted ____U.S.____, 162 L.Ed. 269 (1979), in which the lower courts awarded attorneys fees against members of the state judiciary. Three consolidated by a district court of Texas have followed this principle, the lead case being *Rheuark v. Shaw, et al.*, No. CA3-76-171-F, decided by the United States District Court for the Northern District of Texas. In those cases, the state judge was named as one of the defendants in three 1983 actions where the state record on appeal was tardily prepared to the detriment of their plaintiffs in the cases. The district court found that the state judge was immune but found that he was subject to attorneys fees. The great blow to the doctrine of judicial immunity struck in this district court decision is sharply illuminated by the circumstance that a total of Three Thousand Two Dollars ($3,002) were awarded as damages to three plaintiffs while a total of over Fifty Thousand Dollars ($50,000) in attorneys fees was awarded to the plaintiffs and against the defendants including the judge. (A copy of the Court's judgment in the three cases is attached; the cases are now on appeal to the Court of Appeals for the Fifth Circuit, Docket No. 79-3213). Perhaps the judiciary may hope for the abolition of the doctrine of judicial immunity as to damages in return for a doctrine of immunity against liability for attorneys fees. Certainly, the philosophy that judicial immunity promotes a strong independent and fearless judiciary is seriously undermined by these decisions.

CONCLUSION

To preserve the integrity of the judicial system, the decision of the Court of Appeals permitting the joinder

of a state district judge with private persons in an alleged 1983 conspiracy should be reversed. Additionally, this *Amicus Curiae* respectfully suggests that the Court reverse the decision in *Consumers Union of the United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979), cert. granted ____U.S.____ 162 L.Ed. 269 (1979) where attorney fees were awarded against members of the state judiciary.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LAURA S. MARTIN
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of the State of Texas as Amicus Curiae in Support of Petitioner have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, No. 5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Mr. Finley L. Edmonds, P.O. Box 2624, 1515 Bank & Trust Tower, Corpus Christi, Texas 78403.

_____

LONNY F. ZWIENER

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 31 1979
JOSEPH McELROY, JR.
BY Pam Hall D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JACK RHEUARK VS. BILL SHAW, CLERK OF DALLAS COUNTY COURTS, ET AL	)	NO. CA3-76-0171-F
JOHN D. DOESCHER VS. PAUL T. BASTAS, COURT REPORTER, ET AL	)	NO. CA3-76-1336-F
ROBERT ALLEN JORDAN VS. PAUL T. BASTAS, ET AL	)	NO. CA3-77--0444-F

JUDGMENT

It is ORDERED that Plaintiff Rheuark shall recover $1.00 nominal damages, Plaintiff Doescher shall recover $1.00 nominal damages, and Plaintiff Jordan shall recover $3,000 from the County of Dallas, Texas. Interest on $3,002.00 is awarded at 9% per annum.

It is further ordered that Plaintiff Rheuark's attorneys shall recover $17,082.34 as attorneys fees, Plaintiff Doescher's attorney shall recover $14,256.00 as attorneys fees and $358.59 as expenses, Plaintiff Jordan's attorney shall recover $17,269.45 as attorneys fees and $112.64 as expenses, and John T. Mitchell shall recover $1,270.50 attorneys fees and $100.00 expenses, all to be recovered as a part of the costs from the individual defendants in their official capacities and from the County of Dallas, Texas. All other costs are hereby taxed against the individual defendants in their official capacities and the County of Dallas, Texas.

UNITED STATES DISTRICT JUDGE

DATE August 31, 1979